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Federal Communications Commission  
Office of Secretary

Writer's Direct Dial  
(202) 637-5756

COLUMBIA SQUARE  
555 THIRTEENTH STREET, NW  
WASHINGTON, DC 20004-1109  
TEL (202) 637-5600  
FAX (202) 637-5910

October 22, 1996

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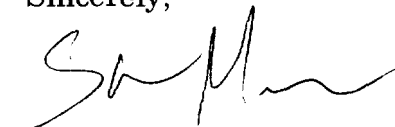
Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: MM Docket No. 96-171  
RM-8846

Dear Mr. Caton:

Enclosed for filing please find an original and four copies of the Reply Comments of KHWHY, Inc. in the above-referenced proceeding. Please date stamp the additional copy of this filing and return it to our messenger.

Sincerely,



Steven F. Morris

Enclosures

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OCT 22 1996

Federal Communications Commission  
Office of Secretary

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MM Docket No. 96-171  
Table of Allotments, ) RM-8846  
FM Broadcast Stations )  
(Indian Springs, Nevada, Mountain )  
Pass, California, Kingman, Arizona, )  
and St. George, Utah) )

To: Chief, Allocations Branch  
Mass Media Bureau

DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF KHWY, INC.**

KHWY, Inc. ("KHWY"), licensee of station KHYZ(FM), Mountain Pass, California, 1/ by its attorneys, hereby submits its reply comments in the above-referenced docket. 2/

**I. INTRODUCTION**

In the Petition for Rulemaking that initiated this proceeding, Claire Benezra ("Benezra"), permittee of KPXC(FM), Indian Springs, Nevada, requested

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1/ On October 18, 1996, and pursuant to prior Commission approval, KHWY (California), L.P. assigned the license to operate KHYZ to KHWY, Inc., the general partner of KHWY (California), L.P. As a consequence of this *pro forma* assignment, KHWY, Inc. is now the licensee of KHYZ.

2/ Notice of Proposed Rulemaking and Order to Show Cause, MM Docket No. 96-171, DA 96-1271 (released August 16, 1996). The Notice set October 22, 1996 for the filing of reply comments.

the substitution of Channel 257C for 257A at Indian Springs. To accommodate the allotment of Channel 257C at Indian Springs, Benezra requested the substitution of three channels, including KHWY's channel at Mountain Pass, California.

KHWY submitted a counterproposal that would permit the allotment of a Class C station to Indian Springs without requiring any additional substitutions. 3/ As KHWY demonstrated, there is a strong public interest in maintaining KHYZ at its present frequency because KHYZ and its sister station, KRXV(FM), provide a unique advisory service to travelers on Interstate 15 through the Mojave Desert. KHWY Counterproposal at 3-5. KHWY's proposal to allot Channel 272C to Indian Springs instead of 257C would permit KHYZ to remain at its present frequency and would not require any additional substitutions. 4/ Moreover, by allotting Channel 272C to Indian Springs in lieu of the 257C requested by Benezra, Indian Springs could have a Class C station that serves a greater "white area" than in Benezra's proposal. The KHWY Counterproposal was supported by KGMN(FM), Kingman, Arizona, which also would be required to move to accommodate Benezra's proposal. 5/

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3/ See Comments, Counterproposal and Response to Order to Show Cause (filed by KHWY (California), L.P. on October 7, 1996) (the "KHWY Counterproposal").

4/ Because of the public interest in maintaining KHYZ at its present frequency and increasing white area coverage, KHWY proposed that the allotment of Channel 272C not be subject to competing expressions of interest. Alternatively, the Commission could allot Channels 272C and 276C to Indian Springs and reserve one of those channels for Benezra and open the other to competing expressions of interest.

5/ The other station required to move, KSGI-FM, St. George, Utah, has consented to Benezra's proposed substitution.

In comments supporting Benezra's proposal, Brawley Broadcasting ("Brawley"), licensee of KMXX(FM), Imperial, California, proposed an upgrade of its facilities from Channel 257A to Channel 257B1. To accommodate this upgrade, not only must KHYZ move, as requested by Benezra, but KVEZ(FM), Parker, Arizona, also must change from its present Channel 257 to Channel 258. Brawley committed to reimburse KVEZ for the expenses associated with moving stations, but made no promise to reimburse KHYZ.

As described herein, Brawley's proposal is procedurally and substantively deficient and should be dismissed. Accordingly, for all the reasons described in KHWY's comments, the Commission should allot Channel 272C to Indian Springs instead of the substitutions proposed by Benezra.

## **II. BRAWLEY'S PROPOSAL IS NOT A COUNTERPROPOSAL AND SHOULD HAVE BEEN FILED AS A PETITION FOR RULEMAKING**

Brawley states that its proposed upgrade may not qualify as a counterproposal because "it is conditional on, rather than mutually exclusive with," Benezra's proposal. The case cited by Brawley, *Milton, West Virginia and Flemingsburg, Kentucky*, 11 FCC Rcd 6374 (1996), states clearly that proposed upgrades that are "merely contingent" on the substitution proposed in a Notice of Proposed Rulemaking are not counterproposals and need not be considered in the same proceeding. *See also Wilmington, North Carolina*, 6 FCC Rcd 6969, 6971 (1991); *Implementation of BC Docket No. 80-90 to Increase the Availability of FM*

*Broadcast Assignments*, Memorandum Opinion and Order, 5 FCC Rcd 931 (1990).

Based on this long-standing policy, Brawley's proposal is deficient and should be dismissed.

A principal reason for limiting counterproposals to mutually exclusive proposals, rather than contingent proposals, is to avoid unreasonable delay in processing amendments to the Table of Allotments. <sup>6/</sup> That policy supports dismissal of the so-called counterproposal filed in this case by Brawley. At a minimum, the Commission would be required to issue a Further Notice of Proposed Rulemaking ordering KVEZ(FM) to show cause why it should not be required to move to a different station. The Commission then would have to consider any mutually exclusive counterproposals filed in response to the Further Notice and, based on Brawley's logic, any proposals that might be mutually exclusive with such counterproposals. All these additional proceedings would delay the provision of first aural service that will result from an assigning a Class C station to Indian Springs, which is precisely why the Commission limited the scope of permissible counterproposals.

Indeed, Brawley's novel argument that its proposal should be considered here because it may be mutually exclusive with a counterproposal that does not require KHYZ to move is completely unavailing because Brawley is not an interested party in this proceeding. While KHWY has filed a counterproposal which does not require KHYZ to move, that counterproposal does not have the potential to

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<sup>6/</sup> *Milton, WV*, 11 FCC Rcd at 6374.

harm Brawley. Even if the Commission accepted the KHWY Counterproposal, Brawley would have the same right to file a Petition for Rulemaking requesting an upgraded allotment for Imperial that it had before Benezra filed here proposal. 7/ Therefore, because a decision by the Commission to adopt the KHWY Counterproposal would simply preserve the status quo for Brawley, that counterproposal should not give Brawley any right to participate in this proceeding and delay the allotment of a Class C station to Indian Springs.

### **III. BRAWLEY HAS NOT ESTABLISHED THAT IT CAN PROVIDE THE REQUIRED INTERFERENCE PROTECTION TO TWO SHORT-SPACED MEXICAN STATIONS**

Even if the Commission decided to consider Brawley's proposal in this proceeding, the proposal cannot be granted because Brawley has not made the required technical showing. 8/ As described in the attached Engineering Statement, the proposed location of Brawley's upgrade station at Imperial would be short-spaced to two Mexican stations in violation of 47 C.F.R. § 73.207(b)(3). Although restricted allotments and assignments may be permitted under the U.S.-Mexican Agreement, Brawley has not established whether it can provide the required

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7/ If Brawley filed a Petition for Rulemaking, it would be required to commit to reimbursing KHWY for changing its channel, which it has not done here. Indeed, even if the Commission required KHWY to change KHYZ's channel in this proceeding, which it should not, Commission policy requires Brawley to reimburse KHWY because it would be a beneficiary of the change. *See Milton, WV*, 11 FCC Rcd at 6374 n.1 (stating that all benefiting parties must reimburse a licensee that is forced to change its channel).

8/ *See, e.g., Fort Bragg, California*, 6 FCC Rcd 5817 n.2 (1991) (counterproposals must be technically and procedurally correct).

interference protection to these two Mexican stations. Accordingly, the Commission cannot grant Brawley's proposal.

Furthermore, Brawley's proposed upgrade at Imperial can be accomplished without KHYZ being required to change channels. As described in the Engineering Statement, there are four channels which could be assigned to KVEZ at Parker, Arizona, that would accommodate Brawley's proposal and not require additional substitutions. 9/ This would be preferable to Brawley's proposal because of the important public safety service performed by KHYZ and KRXV for travelers on Interstate 15 through the Mojave Desert. As evidence of the critical role of these stations, the California and Nevada highway departments have placed signs along Interstate 15 instructing motorists to tune to KHYZ on 99.5 and KRXV on 98.1 for emergency, highway and weather information. Relocating KHYZ on the dial would cause confusion and undermine the safety services provided to millions of motorists who rely on 99.5 for critical traveler's information. Accordingly, even if the Commission considers Brawley's proposal in this proceeding, the Commission should not require KHYZ to change channels.

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9/ Of course, before the Commission considers any proposal to upgrade KMXX it must issue a Further Notice of Proposed Rulemaking and provide KHWY and KVEZ an opportunity to show cause why they should not be required to change channels. KHWY reserves the right to comment or make a counterproposal in any future proceeding addressing the upgrade of KMXX at Imperial.

#### IV. CONCLUSION

The proposal by Brawley to upgrade its facilities at Imperial is procedurally and substantively deficient and should be dismissed by the Commission. Rather than adopt Benezra's proposal to upgrade to Channel 257C at Indian Springs, the Commission should adopt the KHWY Counterproposal to allot Channel 272C because it would serve a greater white area without requiring any additional substitutions.

Respectfully submitted,

**KHWY, INC.**

By:   
Marissa G. Repp  
Steven F. Morris

Its Attorneys

HOGAN & HARTSON, L.L.P.  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004-1109  
(202) 637-5600

October 22, 1996



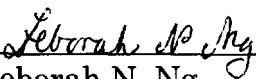
**CERTIFICATE OF SERVICE**

I, Deborah N. Ng, hereby certify that a copy of the foregoing "Reply Comments of KHWY (California), L.P." has been served by first class mail this 22nd day of October, 1996 on the following:

Jerrold Miller  
Miller & Miller  
P.O. Box 33003  
Washington, D.C. 20033  
*Counsel for Claire B. Benezra and  
Brawley Broadcasting*

Bruce A. Eisen  
Kaye, Scholer, Fierman, Hays & Handler  
901 15th Street, N.W.  
Suite 1100  
Washington, D.C. 20005  
*Counsel for KGMN(FM)*

Henry E. Crawford  
Law Offices of Henry E. Crawford  
1150 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036  
*Counsel for KSGI-FM*

  
Deborah N. Ng

**ENGINEERING STATEMENT  
RE REQUEST FOR RULE MAKING  
TO AMEND FM TABLE OF ALLOTMENTS  
TO ALLOT CHANNEL 257B1 AND  
DELETE CHANNEL 257A AT  
IMPERIAL, CALIFORNIA**

**OCTOBER 1996**

**COHEN, DIPPELL AND EVERIST, P.C.  
CONSULTING ENGINEERS  
RADIO AND TELEVISION  
WASHINGTON, D.C.**

City of Washington )  
 ) ss  
District of Columbia )

That he is a graduate electrical engineer, a registered professional engineer in the District of Columbia, and is Secretary-Treasurer of Cohen, Dippell and Everist, P.C., Consulting Engineers, Radio-Television, with offices at 1300 L Street, N.W., Suite 1100, Washington, D.C. 20005;


That the attached engineering report was prepared by him or under his supervision and direction; and

That the facts stated herein are true of his own knowledge, except such facts as are stated to be on information and belief, and as to such facts, he believes them to be true.

S. K. Khanna

**Sudhir K. Khanna**  
District of Columbia  
Professional Engineer  
Registration No. 8057

Subscribed and sworn to before me this 21<sup>st</sup> day of October, 1996.

  
Notary Public

**My Commission Expires:**

2/28/98

This engineering statement has been prepared on behalf of KHWY, Inc., licensee of FM radio station KHYZ, Mountain Pass, California in support of its reply comments relating to the comments filed by Brawley Broadcasting Company (Brawley) in MM Docket No. 96-171 for a rule making to allot Channel 257C (99.3 MHz) to Indian Springs, Nevada.

Station KHYZ(FM) currently operates with CP facilities on Channel 258B (99.5 MHz) with 8.4 kW effective radiated power (ERP) and 551 antenna height above average terrain (HAAT).

Claire B Benezra (Benezra), permittee of radio station KPXC(FM) has proposed in MM Docket No. 96-171, substitution of Channel 257C for currently allotted Channel 257A at Indian Springs, Nevada. Benezra's proposal requires a change in KHYZ(FM) operation from Channel 258B to Channel 259B (99.7 MHz) in addition to switching channels of stations KGMN and KSGL-FM.

KHYZ(FM) has proposed to allot Channel 272C(102.3 MHz) to Indian Springs in lieu of Channel 257C as counter-proposal in MM Docket No. 96.171, by amending Section 73.202 of the Commission's Rules, Table of Allotments. Unlike the Benezra proposal, the proposed allotment of Channel 272C to Indian Springs, Nevada does not require switching of any other station's frequency. In addition, KHYZ's proposal is superior as the proposed operation of Channel 272C would serve more "white" or zero aural service area.

KHYZ has also requested the Commission to reserve the higher power Channel 272C for FM station KPXC(FM) since other channels can be allotted to Indian Springs. For example, Channel 276C can also be allotted to Indian Springs according to the Commission's rules and policies from the same reference coordinates as specified for the proposed Channel 272C.

In response to Notice of Proposed Rule Making in MM Docket No. 96-171, Brawley, licensee of radio station KMXX(FM) has proposed substitution of Channel 257B1 for currently allotted Channel 257A at Imperial, California. Brawley's proposal also requires a change in KHYZ(FM) operation from Channel 258B to Channel 259B (99.7 MHz) in addition to switching the channel of station KVEZ, Parker, Arizona from Channel 257C2 to Channel 258C2.

Station KMXX(FM) currently operates on Channel 257A with 3 kW ERP and 61 meters HAAT. It has filed an application to increase ERP to 6 kW and HAAT to 92 meters.

An FM allocation study indicates the proposed reference site for Channel 257B1 at Imperial is short-spaced to the two Mexican FM stations. These FM stations are: XHATEF, Channel 257A, Tecate, BN and XHKYFM, Channel 257B1, Tijuana, BN, Mexico. The actual distance between the Imperial, Channel 257B1 reference site and station XHATEF is 107 kilometers, while a minimum separation of 138 kilometers is required. Similarly, the actual distance between Channel 257B1 reference site and station XHKYFM is 144 kilometers while a minimum separation of 175 kilometers is

required according to the US-Mexican Agreement on FM stations. Although restricted allotments and assignments are permitted under the US-Mexican Agreement, Brawley has not established whether its proposed Channel 257B1 operation by KMXX(FM) can provide the required protection to the Mexican FM stations. Therefore, its request to make changes in the Table of Allotments (Section 73. 202) does not fully comply with the Commission's rules and regulations and the US-Mexican Agreement.

In addition, the allotment of Channel 257B1 at Imperial, California can be made without requiring KHYZ(FM) to change its frequency. For example, station KVEZ(FM)'s operation can be moved to any one of the following Channels: 248C2, 252C2, 269C2 or 272C2. Since more than one class C2 channel may be available for operation at Parker, Arizona, the Commission can reserve a specific channel for use by KVEZ(FM) only.

Therefore, KHYZ requests the Commission to deny the request for change in KMXX(FM) channel to 257B1 which requires KHYZ(FM) to move its operation to another frequency.